

**CFTC letter No. 03-25**

**June 3, 2003**

**No-Action**

**Division of Clearing and Intermediary Oversight**

X  
XX  
XXX  
XXXX  
XXXXX

Re: Request for relief with respect to CTA performance disclosure requirements under Rule 4.35

Dear X:

This is in response to your letter dated October 28, 2002, to the Division of Clearing and Intermediary Oversight ("Division") of the Commodity Futures Trading Commission ("Commission"), as supplemented by your letter dated January 15, 2003 and by telephone conversations with Division staff. By your correspondence, you request that the Division confirm that it will not recommend that the Commission commence any enforcement action against XXX ("XXX"), a registered commodity trading advisor ("CTA"), regarding its presentation of past performance in accordance with Commission Rule 4.35. [\[1\]](#)

Based upon your representations, we understand the facts to be as follows. XXX is an investment adviser ("IA") registered with the Securities and Exchange Commission ("SEC"), as well as a registered CTA and member of National Futures Association ("NFA"). XXX uses exchange-traded index put options as a hedging mechanism to offset downside equity risk for a portion of the securities portfolios that XXX manages on behalf of its clients. While XXX has one basic trading program or strategy, trading for each client account may vary from the recommended strategy as the clients themselves may implement restrictions on certain securities, sectors, or allocations. Specifically, for a variety of reasons, at any point in time XXX may have a small number of accounts whose rates of return are not materially similar to other accounts in the program, and these may not be the same accounts from month to month. As of May 31, 2002, XXX had approximately 9000 clients, of which only two had open futures positions. These two accounts comprised one million dollars of the eleven billion dollars under management by XXX – less than 0.1%. XXX's most recent disclosure document filed with NFA indicates that as of December 31, 2002, XXX did not manage any accounts with open futures positions.

You have represented that XXX is regulated and subject to examination by the SEC. XXX's advisory activities are directed principally to clients' securities portfolios and its use of futures and options on futures is minimal and primarily limited to hedging purposes. You have further represented that in its recent audit of XXX, the SEC did not note any issues regarding XXX's disclosure of past performance

under SEC regulations.

Based on the foregoing, in particular, that less than 1% of XXX's assets under management represent commodity interest trading, and the fact that XXX is a registered IA, subject to regulation by the SEC, the Division believes that granting XXX relief from the specific disclosure requirements of Rule 4.35 is not contrary to the public interest, and the purposes of the Commodity Exchange Act ("Act")<sup>[2]</sup> and the Commission's rules thereunder. Therefore, the Division will not recommend that the Commission commence any enforcement action against XXX based solely upon its failure to present its past performance information pursuant to the specific requirements of Rule 4.35, provided that XXX remains in compliance with applicable requirements under securities laws and its commodity interest trading continues to represent less than 1% of its assets under management.<sup>[3]</sup>

The no-action position taken in this letter does not excuse XXX from compliance with any other applicable requirements contained in the Act or in the Commission's regulations. In this regard, XXX remains subject to all of the antifraud provisions of the Act,<sup>[4]</sup> to the reporting requirements for traders set forth in Parts 15, 18 and 19 of the Commission's rules, and to all applicable provisions of Part 4. Moreover, this letter is applicable to XXX solely in connection with the activities described in your correspondence.

This letter, including the no-action position granted herein, is based upon the representations that have been made to the Division. Any different, changed, or omitted facts or conditions might render this position void. You must notify the Division immediately in the event the operations or activities of XXX change in any material way from those represented to the Division. Further, the no-action position taken in this letter represents the position of this Division only and does not necessarily represent the position of the Commission or of any other Office or Division of the Commission.

If you have any questions concerning this correspondence, please contact Kevin P. Walek, Assistant Director, at (202) 418-5463.

Very truly yours,

Jane Kang Thorpe  
Director

cc: Regina Thoele, Managing Director, Compliance, NFA

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<sup>[1]</sup> Commission rules cited herein are found at 17 C.F.R. Ch. 1 (2002).

<sup>[2]</sup> 7 U.S.C. § 1 *et seq.* (2000).

[3] See 15 U.S.C. 80b-1 *et. seq.* (2000), and regulations thereunder.

[4] See, *e.g.*, 7 U.S.C. §§ 6b and 6o (2000).